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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 204

MARY K. GIBRAN, as sole heir and next of kin of KAHLIL GIBRAN,

Petitioner,

v.

THE NATIONAL COMMITTEE OF GIBRAN,

Respondent,

and

MARY K. GIBRAN and WILLIAM SAXE, as Administrators c.t.a. of the Estate of KAHLIL GIBRAN,

Respondents.

BRIEF OF RESPONDENT, THE NATIONAL COMMITTEE OF GIBRAN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement.

The author of the copyrighted works involved in this litigation died a resident of New York in the year 1931, leaving no wife, children or other descendants surviving him. He left a will which was duly probated in the Surrogate's Court of New York County. Because the will failed to designate an executor, the Surrogate's Court, on

or about June 4, 1931, granted Letters of Administration with the will annexed to Mary K. Gibran and William Saxe to carry out the deceased author's testamentary directions (29a).[1] Their appointment as such has never been revoked (30a) and they are still in office (4a, 25a).

During the last year of the original copyright term of each of the books, application for renewal was filed by the administrators c.t.a. and also by Mary K. Gibran, individually, claiming as sole next of kin, and duplicate certificates of copyright registration were issued by the Register of Copyrights (20a-21a).

The District Court determined that the right of renewal was vested in the administrators c.t.a. (15a) and that only the certificates of renewal copyright registration issued to the administrators c.t.a. are valid (24a). The opinion of the District Court states, "I hold that although the statute refers to 'the author's executors,' an administrator c.t.a. appointed to enforce and administer the provisions of an author's will which has been admitted to probate, stands in the shoes of an executor and as such is entitled to exercise the right of renewal of the copyright" (11a).

That Court further determined that the author's will bequeathed the royalties on the renewal copyrights to the decedent's home town of Bechari, Lebanon, represented herein by The National Committee of Gibran (17a, 25a), and directed that the accumulated renewal royalties then on deposit in the Registry of the Court be paid over by the Clerk of the Court to the administrators c.t.a. for distribution to the Committee and that the administrators c.t.a. assign the copyright renewals to the Committee, all subject to an accounting in the Surrogate's Court of New York County (25a).

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[1] Page references are to the pages of the printed record.

The Court of Appeals for the Second Circuit affirmed the judgment of the District Court (Appendix to Petition, 21-25).

Reasons for Denying Writ of Certiorari.

The right of copyright renewal is given by the statute (Sec. 24, Copyright Act) to the persons mentioned and in the order of preference named therein. *Fox Film Corp.* v. *Knowles,* 261 U. S. 326.

Under the statute, if an author dies prior to the renewal year, survived by no spouse or children, and leaves a will, the author's executors are the proper persons to apply for renewal. The executors have the same power to apply for renewal that the author himself would have if living, and next of kin are excluded. *Fox Film Corp.* v. *Knowles, supra.*

If the author fails to make a will the renewal right passes to his next of kin. The statute is specific in this respect. Only "in the absence of a will" are next of kin entitled to renewal.

In the instant case the author was survived by no widow or children, and he left a will which bequeathed all copyright royalties, renewal as well as original, to a named beneficiary. His failure to name an executor to carry out the terms of the will is quite understandable when it is considered that he drafted the will himself without the aid of legal advice (29a) and obviously did not appreciate its importance or desirability. Hence administrators with the will annexed were appointed.

It is customary for a will to designate an executor to administer the estate. This is obviously the reason the statute employs the word "executors". But there is no essential difference between an executor and an adminis-

trator c. t. a. For all practical purposes they are identical. If no person is named as executor in a will, or if at any time, for any reason, during the administration of the estate there is no executor qualified to act, the Surrogate's Court must, upon application of any person interested in the estate, appoint an administrator with the will annexed (N. Y. Surr. Ct. Act. Sec. 133).

And when letters of administration c. t. a. are granted, the will of the decedent must be observed and performed; and the administrators c.t.a. have the same rights and powers, and are subject to the same duties, as if they had been *named as executors in the will* (N. Y. Surr. Ct. Act, Sec. 225). (Emphasis supplied.) See also 34 C. J. S., Sec. 1034a.

The distinction between an administrator c.t.a. and an ordinary administrator is that the administrator c.t.a. must look to the will for directions in the management and distribution of the estate, whereas the administrator of an intestate's estate distributes the net assets according to the statute of distribution (*Casoni* v. *Jerome*, 58 N. Y. 315, 320).

In a previous case (*Silverman* v. *Sunrise Pictures Corp.*, 273 Fed. 909, and 290 Fed. 804, cert. den. 262 U. S. 758) the Court below had remarked that the right of renewal cannot be exercised by an administrator c.t.a. It now concedes its statements to that effect were dicta. The administrator c.t.a. in the *Silverman* case was not appointed until years after the renewal period had expired, and therefore the right of renewal by an administrator c.t.a. was not in issue. The surviving executor had rendered his final account and was "fully and finally discharged" and was *functus officio* several years before the statutory renewal year. The conclusion of the Court that, upon the facts of that case, the right of renewal vested in the next of kin was clearly predi-

cated upon its holding that, under Alabama law, when an executor "fully and finally" accounts he is "discharged from office" and thereafter possesses no executorial powers.

Under New York law an executor is not "finally discharged" when a decree is entered upon the judicial settlement of his account. He is discharged from further liability as to all matters embraced in his account and the decree. But the executorial functions are not absolutely terminated thereby in the sense that the executor becomes non-existent. An executor is discharged *pro tanto*. Assets may be subsequently realized and new liabilities incurred, and as to those the executorial duty continues. *Mahoney* v. *Bernhard*, 45 App. Div. 499, 501-2, affd. 169 N. Y. 589; *Joseph* v. *Herzig*, 198 N. Y. 456, 461; N. Y. Surr. Ct. Act, Sec. 274. The same is true with respect to administrators c.t.a. (N. Y. Surr. Ct. Act, Sec. 225).

The decision of the Court below in the present case in no way conflicts with the decision of this Court in *Fred Fisher Music Co.* v. *Witmark & Sons*, 318 U. S. 643, as claimed by the petitioner. The sole question before the Court in the *Witmark* case was whether the Copyright Act itself nullifies *an agreement* by an author, made during the original copyright term, *to assign* his renewal. It was held that such an agreement is valid and enforceable. The agreement to assign the renewal created only an expectancy which depended upon the author's survival until at least the first day of the twenty-eighth year of the original copyright term. The author had agreed to assign his renewal after he had secured it. His right to renew necessarily depended upon his survival to the renewal year. The agreement to assign, and the premature assignment itself, would not have cut off the rights of renewal extended to widow, children, executors, or next of kin, if the author had died prior to the renewal period.

The *Witmark* case concerned the disposition of the renewal copyright after the author himself had secured the renewal in his lifetime. Having survived until the renewal period the author alone had the right to apply for renewal.

The present case concerns the disposition of renewal copyrights by the will of an author, the right to apply for renewal being conferred upon his "executors" (administrators c. t. a.). The right of renewal granted by the statute to "executors" assumes the death of the author prior to the renewal period. The legatee had only an expectancy during the author's lifetime which depended upon the author's death prior to the renewal year leaving no widow or children.

Sections 24 and 28 of the Copyright Act, read together, clearly give to an author who is survived by no spouse or children the right to bequeath by will his copyright renewals.

When an executor or an administrator c. t. a. exercises the renewal privilege, he does so in his representative capacity for the benefit of the person or persons entitled to receive under the terms of the will. *Silverman* v. *Sunrise Pictures Corp.*, 273 Fed. 909, at 912-913.

Conclusion.

The decision of the Court below is clearly sound. That decision in no way conflicts with any decision of this Court. The questions decided below are not of sufficient importance to warrant review by this Court. For these reasons a writ of certiorari should be denied.

Respectfully submitted,

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